From: [redacted]
Sent: Sat, 6 Mar 2021 16:38:39 +1100
To: Contact Us
Cc: [redacted]
Subject: Representation - Re DA 0016/2021

06.03.21

The Launceston City Council.
The General Manager & Planning Officer Eric Smith.

Notice of Planning - DA 0016/2021 – Objections to be noted.

Dear Sirs,

We are the owners of [redacted] and wish for the council to understand the nature of actual business transactions that take place at 152 Bathurst Street and the dangers they present.

Publicly the owners of 152 Bathurst Street have stated that Exotic Massage is the activity that takes place on the premises. The owners publicly stated that erotic massage is when both the client and the masseuse are both naked and the massage includes the genitals. Clearly this is a business trading in sex acts.

Our concerns are for the females in our family and those that live close by to 152 Bathurst Street.
The very nature of the business represents a danger to any female in the area both physically and psychologically.
The likelihood of the clients approaching females that do not work in the business is very high.
The traffic of clients both from the front and rear of the premises allows no safe passage any of the females that reside close by.

The council has to consider the very nature of the type of massage that is operating at the premises and that it has been operating without proper permit for some time, clearly trying to avoid proper process.

All females have a right to feel safe and the very nature of this business undermines that.
Sex acts are not what the general public would consider to be "massage therapy". We ask that the council consider that definition of massage therapy and disallow the application.

Regards,
Louise Millwood & Kerry Haywood.

[redacted]

Mr. Kerry Haywood.

[redacted]

[redacted]

FILE No.	DA0016/2021				
EO	✓	OD		Box	✓
RCV'D 10 MAR 2021 COL					
Doc ID.					
Action Officer [redacted]		Noted		Replied	

5th March, 2021

City of Launceston
Chief Executive Officer
P.O. Box 396
LAUNCESTON 7250

ECOPY: E. SMITH

Mr. Peter Sherriff
[redacted]

Attention: Mr. Michael Stretton

Dear Sir,

RE: NOTICE OF PLANNING APPLICATION No. DA0016/2021

I refer to the above and submit the following as an objection to the applicant having approval to use the building located at 152 Bathurst Street, Launceston ("the premises") for a mixed-use purpose of "visitor accommodation" and business and professional services", specifically "massage therapy".

What is "massage therapy"?
I refer you to the decision of the Anti-Discrimination Tribunal of Tasmania cited as *Capocchi v West & Bates* [2020] TASADT 8 and published on the Australasian Legal Information Institute's website.
(see https://austlii.edu.au/cgi-bin/viewdoc/au/cases/tas/TASADT//2020/8.html)
This decision repays careful reading, as it provides what is presumably, a reliable account of some of the activities that have been undertaken on the premises since approximately 13th May, 2019.

I invite you to find, as I have, that the term "massage therapy" as used in this development application, includes (*but is perhaps not necessarily limited to*) "massaging the entire body, including the genitals. The client and the masseuse are generally naked.". (see page 11 of *Capocchi* v *West*)

Use class.
I object to the attempt, as per this development application, to "shoe horn" the above described activity into the Use Class of Business and Professional Services, as provided by the Launceston Interim Planning Scheme 2015, ("the scheme") on the premise that "massage therapy" is a similar activity to those listed as examples in the scheme, notably a consulting room and a medical centre.

The consulting room as proposed by the scheme is limited to use by a "registered practitioner" and a medical centre is limited to out-patient

patronage, by those providing health services, who I very much doubt would be able to provide their services while being unqualified and/or unregistered by a governing body, such as the Australian Medical Association.

This clear and deliberate distinction places "massage therapy" in a very different category, one seemingly not contemplated by the scheme, perhaps for very sound reasons.

Arson at the premises.
I first lived at [redacted] in 1999 and purchased the property in 2002 and currently own it. In the time I have been involved with this neighbourhood, nothing of the nature of a deliberately lit fire, to my knowledge, has occurred in the area in that time.

I can only assume that the fire, in the early hours of the 15th November, 2020, at the premises, was connected to the activities undertaken therein. I am confident that had the premises been occupied for the purposes of either a consulting room or a medical centre, a fire such as the one on the 15th November, 2020, would not have occurred and that the risk to the safety and security of a heritage listed, historically significant building, would therefore be minimised.

Yours faithfully [redacted]

[redacted]

Peter Sherritt

[redacted]

Anti-Discrimination Tribunal of Tasmania

Capocchi v West & Bates [2020] TASADT 8 (25 November 2020)

Last Updated: 8 January 2021

[2020] TASADT 8

JURISDICTION: ANTI-DISCRIMINATION TRIBUNAL

CITATION: *Capocchi v West & Bates* [2020] TASADT 8

PARTIES: CAPOCCHI, Zoe

v

WEST, Roderick

BATES, Celeste

HELD AT: Hobart

REFERENCE NO(S): A/2020/22

HEARING DATE(S): 12 November 2020

DELIVERED ON: 25 November 2020

REFERRING SECTION(S): 71(3)

DECISION OF: Chairperson Clues

CATCHWORDS: Review of dismissal – indirect discrimination – direct discrimination – prohibited conduct

Anti-Discrimination Act 1998 (Tas), s14, 14, 16(3), 17(1), 22(1)(d), 71(3), 71(4), 72; *Work Health and Safety Act* 2012, s7, 8, 17 and 21;

State of Tasmania v Anti-Discrimination Tribunal & Ors [2009]; *Cain v The Australian Red Cross Society* [2009] TASADT 3; *Drummond v Telstra Corporation* [2008] VCAT 2630; *Arkley v Catholic Care Tasmania & Witt* [2017] TASADT 3; *Costello v Tasmania Police* [2012] TASADT 9

DETERMINATION: Decision of the Anti-Discrimination Commissioner to dismiss the complaint was the correct decision.

REPRESENTATION:

Counsel:

Complainant: B. Frake

Respondents: R. Browne

Solicitors:

Complainant: BDF Law

Respondent: Fitzgerald & Browne Lawyers

[2020] TASADT 8

Chairperson Clues

REASONS FOR DECISION

Introduction

1. The complainant has applied to the Anti-Discrimination Tribunal (the Tribunal) to review a determination made by the Anti-Discrimination Commissioner (the Commissioner) on 31 July 2020 dismissing her complaint.

2. The application, dated 4 August 2020, is made pursuant to s71(3) of the Anti-Discrimination Act 1998 (the Act) and it is made within the 28 days prescribed by s71(4) of the Act.

Background

3. The complainant lodged a complaint with the Commissioner on 19 December 2019 against the respondents.

4. In summary, the complainant alleges discrimination and conduct which is offensive, humiliating, intimidating, insulting or ridiculing on the basis of lawful sexual activity in connection with accommodation.

5. After conducting an investigation, the Commissioner dismissed the complaint on the basis that it did not disclose:

- *indirect discrimination;*
- *direct discrimination;*
- *offensive, humiliating, intimidating, insulting or ridiculing conduct on the basis of lawful sexual activity;*
- *any other breach of the Act.*

The Nature of the Review Process

6. In State of Tasmania v Anti-Discrimination Tribunal & Ors [2009] TASSC 48 Porter J discussed the nature of a review under s72 of the Act. At [39] he held:

> *"I conclude that the review carried out by the Tribunal under s72 is a 'comprehensive' merits review, and is not confined to the material which was before the Commissioner. I think that the proper meaning of the scheme is that in carrying out a review, the Tribunal may take into account such material as it thinks fit."*

7. Porter J went on to say at [42]:

> *"Under the terms of s72, the Tribunal is only concerned with whether or not it is satisfied that the Commissioner made a correct decision. On those bases, the question for the Tribunal is what decision ought to have been made, and the Tribunal has to address the same issues as did the Commissioner."*

8. This review involves a re-examination of the relevant material, that is, the material considered by the Commissioner, together with any other relevant material provided to the Tribunal. If the Tribunal is satisfied the Commissioner's decision was correct, the complaint lapses. If it is not so satisfied, the Tribunal is to deal with the complaint as if it were an inquiry.

The Complainant's Case

9. The complainant alleges she was the recipient of:

- *Indirect discrimination in breach of s15 of the Act.*
- *Direct discrimination in breach of s14 of the Act.*
- *Conduct that is offensive, humiliating, intimidating, insulting or ridiculing on the basis of lawful sexual activity in connection with accommodation (in breach of ss17(1), 16(d) and 22(1)(d) of the Act).*

10. In support of her complaint, the complainant relies upon the following documents that were before the Commissioner as part of her investigation:

(a) the complaint received on 19 December 2019 together with the following attachments:

- **various Facebook and text messages and Rental Agreement (C4);**

(b) the complainant's response to the respondents' reply (C10);

(c) email from the complainant's lawyer (BDF Law) dated 18 June 2020 (C11);

(d) letter from Tasmania Police to BDF Law dated 4 June 2020 (C12).

11. In summary, the complainant alleges she was indirectly discriminated against by the respondents. In support of the claim of indirect discrimination the complainant submits:

• *Everyone that books the respondents' rooms at Studio 14 and Studio 152 are sex workers who run their own independent businesses. They are not in an employment relationship with the respondents.*

• *It is unreasonable for the respondents to impose the following condition on the renting of their rooms at Studio 14 and Studio 152:*

> *"12. Use of the rooms is solely for sensual adult massage. Sex of any kind is not permitted."*

• *Due to the fact that it is unlawful for any person other than a sex worker to manage their own sexual services business, it can never be reasonable for someone else to control what a sex worker does with their body or how they conduct their business.*

12. The complainant alleges she was directly discriminated against by the respondents because on 18 November 2019 she was ejected from the "Celestial Suite" which was not connected to the rental of rooms at Studio 14 or Studio 152 and which she had paid for, for her own personal use.

13. In support of the claim for prohibited conduct which the complainant says she was offended, humiliated, intimidated or ridiculed her on the basis of lawful sexual activity in connection with accommodation. She relies upon a text message sent to her by the first respondent on 19 November 2019 which states as follows:

> *"Zoe you lowlife. You have the Studio website on your Locanto ad saying you do full service at Studio 152 and the photos Celeste took of you for free in the Studio you are using those to try to take business away from the other Angels at the Studio. How dare you. You really must fucking hate Celeste and want to do everything you can to hurt her. Ok it's on. We were going to let it go but it's on. We will brief our barrister and you can expect a writ soon for breach of contract. You can expect everything now and everyone to know.*
> *Your ad massively damages the Studio reputation as well in addition to breaches of your contract. Clients are ringing asking for full service all morning. We will he* [sic] *pursuing you for full damages. We have copies of the ad."*

The Respondents' Case

14. In defence of the complaint, the respondents' rely upon the following documents that were before the Commissioner as part of the investigation:

(a) the complaint received on 19 December 2019 together with attachments (C4);

(b) the response from the respondents to the complaint (C9);

(c) emails and attachments from the first respondent (C13 and C14).

15. The respondents also rely upon the following further documents tendered in evidence at the review hearing:

(a) October 2020 Survey of Renters (R1);

(b) Skedda documents (R2);

(c) letters exchanged between the Commissioner of Police and R Browne dated 24 October 2018, 22 November 2018, 29 April 2019 and 7 May 2019 (R3);

(d) statement of Roderick West (R4).

16. With respect to the complaint of indirect discrimination, the respondents submit that the imposition of condition 12 in relation to the prohibition of sex in the rental agreement (C4) was not unreasonable in the circumstances because:

(a) The intention of that condition was to protect the health, welfare and safety of renters of those rooms.

(b) The overwhelming majority of the renters want the conditions because otherwise they are put under too much pressure by clients to have sex. It is easier for them to refuse on the basis that it is against the rules.

(c) The rooms are used by subcontractors as their workplace and as a result the respondents have management or control of fixtures, fittings or plant in that workplace. Accordingly they have a duty to ensure the health and safety of the renters and minimise risks to them. See ss7, 8, 17 and 21 of the Work Health and Safety Act 2012.

(d) By not allowing sex, the following risks are minimised:

- pressure on women to have sex when they do not want to;
- sexual assault;
- injury (for example, as a result of having sex on a massage table);
- contracting sexually transmitted infections.

17. The respondents say there was no direct discrimination on the basis that the condition imposed by the rental agreement applied to all renters equally. All of the terms and conditions of the rental agreement were accepted by each of the renters every time they made a booking via the Skedda platform to rent a room at either Studio 14 or Studio 152.

18. In relation to the complaint that the eviction from the Celestial Suite on 18 November 2019 was direct discrimination the respondents submit, first that I have no jurisdiction to deal with this complaint as it was not part of the original complaint

made to the Commissioner. Secondly, and in the alternative, if I do have jurisdiction there was no direct discrimination in any event, as the terms and conditions relating to the hire of that room were different and not relevant to the issues raised in the complaint. Further, the complainant was evicted as a result of deceiving the respondents not as a result of her lawful sexual activity. Deception is not an attribute in s16 of the Act.

19. In defence of the complaint of prohibited the respondents say that whilst the choice of language used the text sent by the first respondent to the complainant on 19 November 2019 was poor, it was the result of the respondents being very upset that the complainant had used the photographs taken at Studio 152 and their website address to promote her own private business on the Locanto advertising platform. The photographs were taken for free by the second respondent of the complainant in Studio 152. They contained "iconic" furniture and fittings from that studio. Further, the fact that the complainant used those photographs and the respondents' website in her advertisements, directly linked her business of providing "full service" to the respondents' premises where full service was not offered.

20. The text was not sent as a result of the complainant's "lawful sexual activity" of offering full service in her own business but rather it was sent because the respondents were very upset that the complainant had directly connected her own private business with the respondents' premises.

Facts

21. Prior to the review hearing the parties filed a statement of agreed facts (C1). The following facts are agreed:

(a) At all material times, the complainant was a sole trader who operated a business providing sexual services.

(b) At all material times, the second respondent was the registered proprietor of premises known as premises known as "Studio 152", which is located at 152 Bathurst Street in Launceston. The second respondent was responsible for the management of Studio 152.

(c) The complainant rented rooms from the second respondent at Studio 152 on several occasions, and a room from the first respondent (as agent for the owner) at "Studio 14" at 14 Golbourn Street in Hobart on one occasion only, during the period of 19 July 2019 until about 18 November 2019.

(d) At present, there are 35 women currently renting rooms at Studio 152 and Studio 14. These include students earning money to put themselves through university, women with partners or husbands supporting their families or trying to buy a house, and single mothers who do erotic massage work to support their children so they can earn a higher income. Tenants also include single women saving to buy a house.

Mechanisms for renting rooms

(e) Rooms at the premises owned by the second respondent and rented through the first respondent were booked by tenants through Skedda (an online platform) and clients booking services using "Setmore" via the respondents' website, via telephone calls and by text messages to the telephone number provided by the respondents' website. Services were also booked by calls and texts to the tenant's own phones.

(f) Skedda and Setmore are both online booking platforms which are owned and operated independently of the first and second and respondents.

(g) The first and second respondents have accounts on Skedda which allows for tenants to book rooms for periods of time.

(h) The respondents do not have control over the complainant's access to Locanto. During the period July – December 2019 tenants were free to advertise their services as they chose. The respondents did not have control over the tenant's own advertising.

Nature of sexual services provided by the complainant

(i) In the sex industry, penetrative sexual services (including vaginal and anal intercourse) are colloquially referred to as "full service".

(j) The complainant provided erotic massage services and sexual services.

(k) The complainant did not consult with the respondents regarding her provision of "full service" to clients.

The second agreement and the meeting at Pigeon Hole Café

(l) On or about 18 November 2019 at approximately 2:00pm, the first and second respondents met with the complainant at the Pigeon Hole Café in Hobart.

(m) In the course of the meeting, the complainant volunteered and admitted that she had engaged in "full service" on the premises rented from the second respondent.

(n) The respondents and the complainant left the café at approximately 2:30pm.

(o) The respondents determined at that time that the complainant had breached the conditions of her rental agreement.

(p) At 3:00pm, the complainant was advised by text message from the first respondent that "we are terminating our rental agreement".

(q) Following receipt of that text message, the complainant packed her things and left Studio 14.

(r) The complainant has had no further direct contact with either of the respondents since this time.

22. The text message referred to in paragraph 9(p) reads as follows:

> *"Zoe thank you so much for being honest. However we do need to terminate your rentals including at Studio 14. We would appreciate if you could pack up and leave Studio 14 now that includes access to the Celestial Suite. Warm wishes Rod and Celeste."*

23. In addition to the agreed facts referred to above, I make the following findings of fact based on the evidence:

(a) At all material times the respondents are in the business of renting rooms to renters who wish to provide sensual adult massage. The rental agreement imposed the following condition or requirement:

> *"12. Use of the rooms is solely for sensual adult massage. Sex of any kind is not permitted."*

(b) Sex of any kind means full service which includes vaginal penetration, vaginal oral, oral on the penis and anal penetration.

(c) Each time a room is booked via Skedda, the renter agrees to accept the terms and conditions of the rental agreement including condition 12 referred to in paragraph 23(a) above.

(d) The respondents receive the same amount of rental from each room booked regardless of how much each renter earns whilst operating their own business from the rooms.

(e) The reasons the respondents give for not permitting full service are as follows:

• It is not the business they are in.

• The vast majority of renters want sex prohibited because if one renter offers full service, this puts pressure on the others to do it and it takes business away from those who refuse to do it.

• The renters regard sensual massage as different to full service. The renters (and in some cases their partners) support sensual massage as a way of deriving income, but not full service.

• Allowing full service would turn the premises into a brothel which is a completely different business and tends to attract the "underworld" including bikies and drug dealers.

• The risks and danger associated with working in a brothel are much higher to renters.

• Sensual massage includes massaging the entire body, including the genitals. The client and the masseuse are generally naked. This is different to full service.

• The majority of renters want to offer sensual massage and not full service.

• Most rooms only have massage tables and are only suitable for massage.

• Full service increases health and safety risks. It involves a higher risk of contracting sexually transmitted infections.

• The majority of clients at Studio 14 and Studio 152 do not want full service and would not come to a brothel offering that, particularly female clients and couples.

• The respondents and renters want to operate within the law.

• The renters want a place where people can operate their business in a safe, secure, clean and well organised environment.

(f) Studio 14 and Studio 152 have a number of safety features including multiple CCTV cameras, video doorbells and panic alarms.

(g) As part of the rental price, the respondents advertise in the local newspaper and provided a listing on their website for the renter if they want that.

(h) There is no restriction on renters doing their own advertising or providing their own phone number in their private advertisements on Locanto or The Examiner or any other advertising platform except for Setmore.

(i) The complainant and all of the renters are sex workers. The complainant and the other renters were/are independent contractors who rent Studio 14 and Studio 152 as their workplace. Therefore pursuant to ss7, 8, 17 and 21 of the Work Health and Safety Act 2012 the respondents had/have a duty to all renters to ensure their health and safety and minimise risks to them.

(j) If renters wish to use the rooms at Studio 14 and Studio 152 they must abide by the conditions of the rental agreement.

(k) When the complainant commenced renting rooms at Studio 152 she accepted the conditions imposed by the respondents in the rental agreement but after about 2 months she decided that providing full service was something she could do. She commenced providing full service to clients at the respondents' premises even though she knew she was breaching the terms of the rental agreement.

(l) The complainant could earn more money if she performed full service with clients.

(m) On at least one occasion the complainant complained about another renter who was purportedly providing full service to clients. This complaint was made by text on 29 August 2019. The second respondent responded as follows:

> *"I'm so upset.*
> *I really don't want to be known as a brothel.*
>
> *Not that there's anything wrong with that.*
>
> *But it's not what we created"*

The complainant responded:

> *"I understand. We get paid more. I know but she can rent a hotel. I can't and don't want to compete with that."*

The second respondent responded:

> *"Exactly.*
> *It wrecks it for u girls.*
>
> *Totally wrecks it for everyone"*

(n) The complainant was privately advertising her services of "erotic massage" in The Examiner newspaper and on an advertising platform known as Locanto.

(o) The respondents did remove renters' private phone numbers from their website.

(p) For several months, the relationship between the complainant and the respondents was very amicable. On 4 November 2019 the following text exchange took place between the first respondent and the complainant. The first respondent stated:

> *"We appreciate all you do so much and want to give back where we can and make the whole thing simpler and easier. There are some things that have become a but* [sic] *confusing and a barrier to your booking. We also need to make it set without changes so it doesn't keep changing for you."*

The complainant responded:

> *"I know you do. And you care, our safety is first.*
> *Spending time with you guys was wonderful."*

(q) Between 13 and 18 November 2020 the complainant expressed a number of concerns in relation to the terms and conditions of the rental agreement. The complainant made a number of complaints including the following:

A. The cancellation policy made her life a lot more difficult in terms of childcare.

B. The rent was high enough.

C. She loved working there but knew she could pick up and work anywhere.

D. She needed to pay for her own advertising in order to do well.

E. She respected the way the respondents wanted to run their rental property but it was not cost effective to her if she had to pay more.

F. She was thinking about her options.

G. She accepted it was not her rental property and she could either "take it or leave it".

H. She did not want to be under a contract as she worked for herself.

I. The Studio phone hardly ever rang.

J. She would prefer not to be on Setmore as it takes away her control over bookings.

(r) As a result of receiving these complaints it seems the first respondent made a number of changes to the rental agreement and the way the rooms were booked. The changes included:

A. A 7 day cancellation policy.

B. A set rate for each room.

C. No private numbers on the website because this resulted in a higher booking rate and focussed on the renter working on the day.

D. Private phone numbers could be advertised in any private advertisements.

(s) The text from the first respondent outlining these changes concludes as follows:

> *"We provide incredible support and a place to get angels going in this business. It would be very sad if you started here and then fucked Celeste over by leaving and going privately. Yes you could do it privately but you never would have even started and have this amazing opportunity to transform your life. The studio provides everything and Celeste has literally spent tens of thousands to create the place and security so you are safe. Working from hotels is illegal and they will throw you out. The rental rates on the mainland are 3 times as much and they take a percentage of each client. If you make $1000 Celeste still only gets the same rent.*
> *The updated rental agreements will be sent shortly and need to be signed.*
>
> *Hopefully that covers everything. We try to make it work for everyone and find he* [sic] *best agreement. The main thing also is that it is set and does not change. How does all that sound?"*

(t) On 18 November 2020 the complainant booked Studio 14 in Hobart which included access to the Celestial Suite.

(u) The complainant met with the respondents at the Pigeon Hole Café on that date. At the meeting the complainant admitted she had been providing full service to clients at Studio 152.

(v) After that meeting the respondents sent the following text to the complainant:

> *"Zoe thank you so much for being honest. However we do need to terminate your rentals including at Studio 14. We would appreciate*

if you could pack up and leave Studio 14 now that includes access to the Celestial Suite. Warm wishes Rod and Celeste."

(w) On or about 19 November 2019 the respondents discovered the complainant had used photos taken of her by the second respondent at Studio 152 featuring "iconic" furnishings and fittings from that property and further that she had referred to the Studio 152 website on her own Locanto advertisement, where she was advertising that "**FULL SERVICE NOW AVAILABLE**".

(x) The respondents formed the view that the complainant did this to take business away from the other renters at Studio 152, to hurt the second respondent and damage the reputation of Studio 152 by allowing clients to believe that full service was now being offered at Studio 152.

The Commissioner's Decision

24. With respect to indirect discrimination the Commissioner determined that the reasons advanced in favour of the conditions imposed by the rental agreement "are significant and persuasive". She said at page 7 of her investigation decision and reasons for decision (C15):

> *"I consider it would not be reasonable for the Act to be used to diminish or eliminate existing measures that are in place for women's safety and to ensure women are not pressured into having sexual intercourse.*
> *I therefore do not consider the condition to be unreasonable in the circumstances. As a result, the complaint does not disclose possible indirect discrimination."*

25. With respect to direct discrimination the Commissioner stated at page 7 of her decision (C15):

> *"In this case, Ms Capocchi has the attribute lawful sexual activity, and the people that the respondents rent the premises to also have the attribute lawful sexual activity. Ms Capocchi is seeking to engage in lawful sexual activity that is contrary to the rental agreement, however.*
> *It appears from the information provided the respondents was* [sic] *treating all masseuses renting their studios equally, and would have treated any one who did not comply with the condition in the rental agreement the same way. As a result, I consider the complaint does not disclose possible direct discrimination."*

26. The Commissioner makes no reference to whether the respondents' eviction of the complainant from the Celestial Suite on 18 November 2019 amounted to direct discrimination as alleged by the complainant at the review hearing. There is no

mention of the Celestial Suite in the complaint. There is a vague reference in the complaint to the respondents refusing to allow the complainant to continue to hire their Airbnb premises from 18 November 2019 but there was no further mention of the Celestial Suite until counsel for the complainant made her closing submissions at the review hearing.

27. In relation to conduct that is offensive, humiliating, intimidating, insulting or ridiculing on the basis of lawful sexual activity in connection with accommodation the Commissioner says at page 8 of her decision (C15):

> *"The language used in the messages was not moderate and I accept the messages would be offensive, insulting and intimidating to Ms Capocchi.*
> *From the information provided, however, it is clear that the basis for the messages was not Ms Capocchi's lawful sexual activity, but rather that Ms Capocchi no longer worked out of the respondents' studios, but had put an advertisement online stating that her website was that of the respondents' studio, used pictures that were taken in the respondents' studio, and 'FULL SERVICE NOW AVAILABLE'."*

28. The Commissioner continues:

> *"It is clear that this was the basis for the conduct, rather than Ms Capocchi's lawful sexual activity.*
> *The complainant therefore does not disclose possible offensive, humiliating, intimidating, insulting or ridiculing conduct on the basis of lawful sexual activity."*

Preliminary Issues

29. First, the attribute relevant to the allegations of indirect discrimination (s15), direct discrimination (s14), and prohibited conduct (s17) is "lawful sexual activity" (s16(d)) and the activity is in connection with accommodation (s22(1)(d)). Therefore the threshold requirements for the Act to apply to the complaint have been met.

30. Secondly, at the review hearing, counsel for the complainant submitted in her closing submissions that the complainant had been subjected to direct discrimination because on 18 November 2019 she was evicted from the Celestial Suite on the basis of lawful sexual activity. She submitted that the Celestial Suite was unconnected to Studio 14 or Studio 152 and that the complainant had rented the Celestial Suite for her own personal use.

31. Counsel for the respondents submits that the Tribunal has no jurisdiction to deal with this issue as it was not raised in the complaint and there was no evidence about it.

32. In the complaint it states:

> *"Due to the fact that I did not agree to sign the Rental Agreement both Celeste Bates or Roderick West refused to allow me to continue to hire their Airbnb premises from the 18 November 2019, which means I have been discriminated for lawful sexual activity."* (C4)

33. There is no mention of the Celestial Suite in the investigation material.

34. In the complainant's response to the respondents' reply, the termination on 18 November 2019 is referred to in the following terms:

> *"They* [the respondents] *advised Zoe by text message 'We are terminating our rental agreement right now'. Zoe is aware the respondents tried to re-rent that room that day."*

35. The only reference is to a single room at Studio 14.

36. The Commissioner makes no reference to the Celestial Suite in her decision. At the review hearing there was no evidence led about the terms of the rental of the Celestial Suite. The only mention of the Celestial Suite in the evidence is in the attached text message to the agreed facts. (C1)

37. I consider the eviction from the Celestial Suite to be a new complaint and the Tribunal has no power to receive a new complaint, only the Commissioner has that power[1]. In the circumstances I determine that I have no jurisdiction to deal with the allegation of direct discrimination as a result of the complainant being evicted from the Celestial Suite.

Indirect Discrimination

38. The case of Cain v The Australian Red Cross Society [2009] TASADT 3 sets out the elements of indirect discrimination at [56] and [57]:

> *"[56] The elements of indirect discrimination are set out in s15 in the following terms:*
> *'(1) Indirect discrimination takes place if a person imposes a condition, requirement or practice which is unreasonable in the circumstances and has the effect of disadvantaging a member of a group of people who -*
>
> *(a) share, or are believed to share, a prescribed attribute; or*
>
> *(b) share, or are believed to share, any of the characteristics imputed*
>
> *to that attribute-*

more than a person who is not a member of that group.

(2) For indirect discrimination to take place, it is not necessary that the person who discriminates is aware that the condition, requirement or practice disadvantages the group of people.'

[57] The elements of s15 are as follows:

1. Imposition of 'condition, requirement or practice'.

2. The condition, requirement or practice is unreasonable in all the circumstances.

3. It has the effect of disadvantaging a complainant.

4. The complainant is disadvantaged as a member of a group of people who share or are believed to share a prescribed attribute more than a person who is not a member of that group."

39. In this case, the respondents imposed a condition in their rental agreement (C4) that renters could not provide full service to clients whilst renting rooms at Studio 14 or Studio 152.

40. The question of whether the imposition of that condition is unreasonable must be determined with reference to the activity in which the putative discriminator is engaged. When assessing what is reasonable, health and safety requirements are factors that can be taken into account[2].

41. The issue arising from s15 is whether the condition imposed to disallow renters from providing full service to clients whilst renting the respondent's premises is reasonable.

42. The respondents' position is that the condition is reasonable for the reasons outlined in paragraph 23(e) above (the reasons).

43. The complainant's position is that the condition is unreasonable because she runs her own independent business as a sex worker and it is unreasonable for the respondents to control what lawful sexual activity she offers or how she conducts her business.

44. The Tribunal accepts that there are negative consequences that flow from the imposition of this condition upon the complainant or any other sex worker who wishes to offer full service at the respondents' premises.

45. From the perspective of the complainant the condition seems unfair. She claims she adopts safe sex practices whilst performing sensual adult massage or full service

46. The complainant argues that the condition is unlawful on the basis that the respondents cannot control what she does with her body. She claims that a condition

that is unlawful cannot be reasonable.

47. The Tasmania Police wrote to the complainant's counsel on 4 June 2020 (C12) and advised as follows:

> *"The Commissioner has no proffered any opinion as to the lawfulness of the agreement forwarded with your letter. Solicitors acting for Mr West and Ms Bates have in the past forwarded him a copy of a pro-forma agreement in similar terms and asked him to advise whether he has formed the belief referred to in section 16(1) of the Sex Industry Offences Act 1991 in relation to the premises at 152 Bathurst Street, Launceston. He responded that he had not formed that belief. He did not consider the lawfulness of the agreement."*

48. There is no evidence before the Tribunal that the condition imposed (condition 12) in the rental agreement is unlawful. The Tribunal finds that the condition serves a legitimate purpose and is not unreasonable. The Tribunal finds that the condition imposed is for the benefit of the majority of the renters of the premises and that the reasons the respondents provide for the imposition of the condition are not unreasonable.

Direct Discrimination

49. Direct discrimination is defined in s14 of the Act which provides:

> *"Direct discrimination*
> *(1) Discrimination to which this Act applies is direct or indirect discrimination on the grounds of any prescribed attribute.*
>
> *(2) Direct discrimination takes place if a person treats another person on the basis of any prescribed attribute, imputed prescribed attribute or a characteristic imputed to that attribute less favourably than a person without that attribute or characteristic.*
>
> *(3) For direct discrimination to take place, it is not necessary -*
>
> *(a) that the prescribed attribute be the sole or dominant ground for the unfavourable treatment; or*
>
> *(b) that the person who discriminates regards the treatment as unfavourable; or*
>
> *(c) that the person who discriminates has any particular motive in discriminating."*

50. In Cain v The Australian Red Cross Society (supra) at [405] the Tribunal set out the following issues that need to be determined in order to decide whether conduct

amounts to direct discrimination:

> *"1. Whether the reason for the treatment is on the basis of the prescribed attributes of lawful sexual activity or sexual orientation or a characteristic imputed to that attribute.*

2. *Whether the treatment of the complainant was less favourable or equal treatment.*
3. *The identification of the comparator - the person without that attribute or characteristic.*

> *4. Whether the complainant suffered a detriment."*

51. The submission of the complainant is that the reason why she was evicted from the respondents' premises was because of the prescribed attribute of lawful sexual activity. The complainant submits that the reason for her eviction was because she admitted she had provided full service to clients at the respondents' premises in breach of the rental agreement. It was argued on behalf of the complainant that full service is a fundamental characteristic of the prescribed attribute of lawful sexual activity.

52. It is the respondents' submission that the reason for evicting the complainant from their premises was not because she was a sex worker offering full service to clients but because she wanted to provide full service at their premises and that did not fit within their unique business model where the focus is on adult sensual massage and where the wish of the respondents and the majority of other renters is to maintain that focus to reduce the health and safety risks to the renters who operate adult sensual massage businesses from the respondents' premises.

53. As stated by the Tribunal in Cain v The Australian Red Cross Society (supra) at [410] the first step for the Tribunal to take is to ascertain the "true reason" or the "genuine reason" for the alleged discriminator's act and to answer the question "Why was the aggrieved person treated as she was".

54. The evidence does not support a finding that the complainant was evicted from the respondents' premises because she is a sex worker who wishes to offer full service but because sex workers who offer full service do not fit within the respondents' business model and pose a higher risk to health and safety to renters of the respondents' premises.

55. The Tribunal finds that the reason for the respondents' conduct in evicting the complainant from their premises was not because she was a lawfully employed sex worker who offered full service (the protected attribute) but because she had performed and proposed to perform in the future full service at the respondents' premises in breach of the rental agreement. This is not a distinguishing characteristic of lawful sexual activity.

56. On behalf of the complainant it was argued that she wanted to perform full service at the respondents' premises and the respondents treated her unfavourably by not

allowing her to do so.

57. The evidence was that at the meeting at the Pigeon Hole Café on 18 November 2019, the complainant was not prepared to accept the terms and conditions imposed by respondents in relation to the use of their premises and she had not accepted them for some months. The response of the respondents was that if the complainant did not want to accept the terms and conditions she could not rent their rooms.

58. This leads to the question of how would a person without the attribute of lawful sexual activity have been treated by the respondents?

59. The Tribunal finds, based on the evidence, that anyone who breached the rental agreement had been evicted and would have been evicted, so in that respect the respondents' conduct towards the complainant was fair and even-handed.

60. There is no doubt that the complainant suffered a detriment as a result of the respondents evicting her from their premises. She lost the opportunity to work from the respondents' premises on 18 November 2019 and in the future. She also lost the opportunity to earn more money providing full service rather than limiting herself to sensual adult massage.

61. The critical issue in relation to direct discrimination is the real and genuine reason for the treatment and not the issue of detriment. Whilst the complainant has established that she suffered a detriment, she has not established the reason for the conduct was an attribute or a characteristic imputed to that attribute and she has not shown that another person in the same circumstance would not have been treated in that way. In conclusion, the complainant has failed to establish that she was subjected to direct discrimination as defined by the Act; see Cain v The Australian Red Cross Society (supra) at [449].

62. In the case of Drummond v Telstra Corporation Ltd [2008] VCAT 2630 Deputy President McNamara said at [57]-[58]:

> *"Most people in one form or another possess most of the attributes. It is a frequent experience in this List that people who feel they have been unjustly dealt with whether in employment or other contexts identify what they see as unfair treatment and their possession of one or more attributes leaping to the allegation then that they have been the victims of direct discrimination.*
> *If this mode of argument were acceptable every instance of unfair dismissal for instance would also be an instance of direct discrimination because every unjustly or allegedly unjustly dismissed employee possesses certain attributes."*

63. In the case of Arkley v Catholic Care Tasmania & Witt [2017] TASADT 3 at [40] Chairperson Webster (as he then was) stated:

> *"No complaint of direct discrimination can be proven or be other than frivolous and lacking in substance, unless, the prescribed attribute was a ground for the unfavourable treatment noting it need not be the sole or dominant ground; see s14(3)(a) of the Act."*

64. In this case, what the complainant is inviting the Tribunal to do is find that she was singled out for less favourable treatment by the respondents by reason of her lawful sexual activity being her entitlement to provide full service at the respondents' premises.

65. The evidence is that the respondents had no problem with sex workers who wanted to provide full service. They just did not want sex workers providing full service at their premises.

66. The fact that the complainant feels she has been treated unfairly does not mean she has been discriminated against. I find there is no direct link between the respondents' decision to cease renting premises to the complainant and her prescribed attribute of lawful sexual activity.

67. Based on the above, if the Tribunal is wrong in finding that it has no jurisdiction to determine the complaint relating to the complainant's eviction from the Celestial Suite, the Tribunal further finds there was no direct discrimination in relation to the cessation of the rental of the Celestial Suite as there was no link to that conduct and the complainant's attribute of lawful sexual activity.

Prohibited Conduct

68. Section 17(1) of the Act provides as follows:

> *"A person must not engage in any conduct which offends, humiliates, intimidates, insults or ridicules another person on the basis of an attribute referred to in section 16(e), (f), (fa), (g), (h) or (j) in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated that the other person would be offended, humiliated, intimidated, insulted or ridiculed."*

69. To substantiate a claim pursuant to s17(1) of the Act, the complainant needs to establish that she was offended, humiliated, intimidated, insulted or ridiculed on the basis of her lawful sexual activity in circumstances in which a reasonable person, having regard to those circumstances, would have anticipated that the complainant would be offended, humiliated, intimidated, insulted or ridiculed.

70. I find that the text message that the first respondent sent to the complainant on 19 November 2019 in which he referred to her as a "lowlife", threatened legal action and said "you can expect everything now and everyone to know" was conduct in which a reasonable person, having regard to all the circumstances, would have anticipated that the complainant would have been offended, humiliated, intimidated or insulted.

However, that is not sufficient; the question that needs to be determined is whether that conduct was on the basis of lawful sexual activity.

71. In the case of Costello v Tasmania Police [2012] TASADT 9 the Tribunal said at [37]:

> *"The complainant asserts that he possesses certain attributes. In this case those relate to his sexual orientation and disability. He is, essentially, dissatisfied with his treatment at the hands of the respondent. He has formed the view that the basis of the respondent's conduct and decision making in his regard is based upon those attributes. At base he asks that an inference should be drawn that the Act has been transgressed because of the existence of an attribute and his dissatisfaction with the respondent's action and decisions. There is no evidence to support that conclusion that there is any link between the two."*

72. The evidence is that neither of the respondents had anything against sex workers who wanted to provide full service. However, for the reasons that have been referred to, they did not want their premises to be known as a brothel.

73. After the meeting at the Pigeon Hole Café where the complainant admitted that she had been providing full service sex to clients at the respondents' premises, the respondents sought to end the relationship amicably. After the meeting at the Pigeon Hole Café the first respondent sent a text message to the complainant in the following terms:

> *"Zoe thank you so much for being honest. However we do need to terminate your rentals including at Studio 14. We would appreciate if you can* [sic] *could pack up and leave Studio 14 now that includes access to the Celestial Suite. Warm wishes Rod and Celeste."*

74. It was not until 19 November 2019 that the respondents' desire to end the relationship amicably changed. This was as a result of the complainant using photographs taken of her at Studio 152 and using the Studio 152 website address on her own Locanto advertisement which stated in bold type "FULL SERVICE NOW AVAILABLE**" (C9).**

75. Section 17 requires ascertainment of the true reason for the first respondent's conduct. It is the view of the Tribunal that the comments made to the complainant by text on 19 November 2019 were not linked to the prescribed attribute of lawful sexual activity but rather the comments were in relation to her use of photographs taken at Studio 152 and the Studio 152 website being used to promote her own business which provided full service. It is clearly arguable that the use of the photographs and the website address linked the availability of full service to Studio 152 which was something the respondents did not want conducted at their premises.

76. In the text message that the first respondent sent to the complainant on 19 November 2019 he said "Clients are ringing asking for full service all morning". This is the exact thing that the respondents had been attempting to avoid pursuant to the terms of the rental agreement.

77. In conclusion, the Tribunal finds that whilst the text message did contain offensive, humiliating, intimidating and insulting language directed at the complainant there is no link between that conduct and the complainant's attribute of lawful sexual activity.

Conclusion

78. Having considered all of the material and the evidence before me at the review hearing the Tribunal determines that the decision of the Commissioner to dismiss the complainant's complaint was the correct decision and accordingly the complaint lapses.

A. M. CLUES

CHAIRPERSON

[1] See s62 of the Act.

[2] See *Waters v Public Transport Corporation* [1991] HCA 49; [1991] 173 CLR 349 at pages 378 and 395.